The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 05-40 June 30, 2005

Petition of KeySpan Energy Delivery New England for Approval of Firm Transportation and Related Agreements with TransCanada Pipelines Limited and Union Gas Limited.

HEARING OFFICER RULING ON MOTION FOR CONFIDENTIAL TREATMENT

I. INTRODUCTION

On May 23, 2005, Boston Gas Company ("Boston Gas"), Colonial Gas Company ("Colonial"), and Essex Gas Company ("Essex"), each d/b/a KeySpan Energy Delivery New England ("KeySpan" or "the Company"), filed with the Department of Telecommunications and Energy ("Department") a Petition for approval of the following firm gas transportation and related agreements:

1. Firm Transportation Contract between Union Gas Limited ("Union") and Boston Gas;
2. Financial Backstopping Agreement between Union and Boston Gas;
3. Firm Transportation Contract between Union and Colonial;
4. Financial Backstopping Agreement between Union and Colonial;
5. Firm Transportation Contract between Union and Essex;
6. Financial Backstopping Agreement between Union and Essex;

7. Precedent Agreement between TransCanada Pipelines Limited ("TransCanada") and Boston Gas;

8. Financial Assurances Agreement between TransCanada and Boston Gas;

9. Cost Sharing Agreement between TransCanada and Boston Gas;

10. Precedent Agreement between TransCanada and Colonial;

11. Cost Sharing Agreement between TransCanada and Colonial;

12. Financial Assurances Agreement between TransCanada and Colonial;

13. Precedent Agreement between TransCanada and Essex;

14. Financial Assurances Agreement between TransCanada and Essex; and

15. Cost Sharing Agreement between TransCanada and Essex.

KeySpan simultaneously filed a motion seeking confidential treatment ("Motion") of the Cost Sharing Agreements between TransCanada and each of the three Companies as well as certain prefiled testimony that references those Agreements. KeySpan provided a redacted version of the prefiled testimony; however, the Company did not provide redacted versions of the Cost Sharing Agreements and instead stated that the Company was seeking protective treatment of the Agreements in their entirety. There are no intervenors in this proceeding.

II. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the

> burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D, permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D, establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, [or] confidential, competitively sensitive or other proprietary information"; second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D, reflect the narrow scope of this exemption. See Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (protecting from disclosure electricity

contract prices, but not other contract terms, such as the identity of the customer); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not and will not be granted automatically by the Department. A party's willingness to enter into a non-disclosure agreement with other parties does not resolve the question of whether the response, once it becomes a public record in one of our proceedings, should be granted protective treatment. In short, what parties may agree to share and the terms of that sharing are not dispositive of the Department's scope of action under G.L. c. 25, § 5D, or c. 66, § 10. See Boston Edison Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

III. KEYSPAN'S MOTION FOR CONFIDENTIAL TREATMENT

KeySpan seeks confidential treatment of certain exhibits as well as testimony that references those exhibits. Specifically, KeySpan contends that the allocation of costs between TransCanada and KeySpan in the event of a cancellation of the agreements must be kept confidential (Motion at 1). The Company further notes that it has not filed redacted copies of the Cost Sharing Agreements because the agreements require that KeySpan seek protective treatment in its entirety (id. at 2). KeySpan provides three justifications for confidential treatment. First, the Company asserts that the terms of the agreements between TransCanada

and KeySpan require that the information be kept confidential (id. at 3). Second, KeySpan argues that the Cost Sharing Agreements contain competitively sensitive and proprietary information, and disclosure would damage KeySpan's leverage in future negotiations with other interstate pipeline carriers (id.). Third, KeySpan contends that public disclosure would be commercially harmful to KeySpan and its customers since other pipeline carriers could use such information to seek similar or better terms (id.).

IV. ANALYSIS AND FINDINGS

KeySpan bears the burden of proving that the information for which protection is sought constitutes trade secrets, or confidential, competitively sensitive, or proprietary information. G.L. c. 25, § 5D. I find that KeySpan has met its burden in part. Specifically, the Company has shown that certain aspects of the Cost Sharing Agreements are competitively sensitive or proprietary and thus should be afforded confidential treatment, as I have specified in Section V below. See, e.g., Bay State Gas Company, D.T.E. 04-111 (Jan. 31, 2005); Bay State Gas Company, D.T.E. 02-52 (2002). However, by failing to provide redacted versions of the Cost Sharing Agreements, the Company seeks protection of their mere existence. Such blanket protection is not warranted, especially given that the Cost Sharing Agreements are referenced elsewhere within KeySpan's filing. See e.g., Petition at 2; Prefiled Testimony of John E. Allocca at 4. In addition, the Cost Sharing Agreements contain general terms and conditions that do not meet the criteria for receiving protection. As such, the Company is required to submit versions of the Cost Sharing Agreements with only those portions constituting competitively sensitive or proprietary information redacted.

In seeking protective treatment, KeySpan does not propose any sunset provision. The risk of competitive harm from public disclosure of these confidential materials, however, decreases with time as the information becomes stale. Accordingly, confidential treatment of these materials will terminate on October 31, 2016, the date upon which the initial term of the proposed precedent agreements expire. Prior to that time, KeySpan may renew its request for confidential treatment, accompanied by proof of the need for such protection.

V. RULING

In sum, the Motion is granted in part and denied in part. Specifically, the Department will protect from public disclosure until October 31, 2016, the terms and information identified below. Within ten (10) days of the date of this Ruling, KeySpan must file, consistent with this Ruling, redacted copies of the Cost Sharing Agreements for the public docket.

Proposed Exh. JEA-9:
Redact pricing, competitively sensitive, and other proprietary information that relates to the Event of Cancellation.

Proposed Exh. JEA-12:
Redact pricing, competitively sensitive, and other proprietary information that relates to the Event of Cancellation.

Proposed Exh. JEA-15:
Redact pricing, competitively sensitive, and other proprietary information that relates to the Event of Cancellation.

Prefiled Testimony of John E. Allocca:
Protection as Requested.

VI. APPEAL

Under the provisions of 220 C.M.R. § 1.06(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal. A written response to any appeal must be filed within two (2) days of the appeal.

/s/
Carol M. Pieper
Hearing Officer